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IN THE

Supreme Court of the United States

October Term, 1968

No. 1285

DETROIT VITAL FOODS, INC.,

Petitioner,

LELORD KORDEL and ALFRED FELDTON,

Defendants,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Detroit Vital Foods, Inc., prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on February 20, 1969 as affirmed the judgment of conviction of the United States District Court for the Eastern District of Michigan, Southern Division, entered on January 19, 1966.

Citations to Opinions Below

The pertinent opinions of the District Court are reprinted in Appendix A, *infra*, pp. 1a-17a, and have not been officially reported.

The first opinion and decision of the Court of Appeals was filed on July 26, 1968 and reversed the judgment of conviction as to the petitioner herein and the individual defendants above named. The Government's motion for rehearing thereon was granted and on February 20, 1969, the Court of Appeals modified its written opinion by affirming the judgment of conviction as to the petitioner herein while adhering to its prior decision reversing the judgments of conviction as to the individual defendants. The opinions of the Court of Appeals and the order granting the Government's petition for rehearing are reprinted in Appendix A, *infra*, pp. 18a-39a, and have not as yet been officially reported.*

Jurisdiction

The judgment of the Court of Appeals was entered on February 20, 1969 and an extension of time to file a petition for writ of certiorari until April 21, 1969 was granted by Associate Justice Potter Stewart by order dated March 20, 1969. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented

1. Whether under the Fourth Amendment, or under the federal courts' supervisory authority over the administration of criminal justice, evidence and leads from evidence obtained over petitioner's objection by compulsory interrogatories served in a civil *in rem* action seeking forfeiture of petitioner's property should have been sup-

* In granting the Government's petition for rehearing of the Court of Appeals' opinion filed on July 26, 1968, the Court directed that the said opinion be reprinted as modified by its opinion of February 20, 1969, and was deemed to be filed as of said date.

pressed in a later criminal prosecution of petitioner based on the same facts, where the civil case and investigation and prosecution of the criminal case went forward on a common front.

2. Whether this Court's holdings in *Costello* v. *United States,* 350 US 359 and *Lawn* v. *United States,* 355 US 339, preclude the dismissal of an indictment which is based exclusively on illegally obtained evidence from a Government official who presented the proposed indictment to the Grand Jury.

3. Whether tape recordings obtained by electronic eavesdropping equipment placed upon petitioner's business premises by a trespass, prior to the time the premises were open to the public, should have been suppressed where the tapes were recordings of public utterances.

4. Whether petitioner is entitled to a remand to the District Court to determine whether the placing of electronic eavesdropping equipment on petitioner's business premises by means of a trespass prior to the time the premises were open to the public provided evidence or leads from evidence relevant to petitioner's conviction.

Statutes Involved

There is here involved the Fourth Amendment, and so much of the Fifth Amendment to the Constitution of the United States as interdicts answering for an infamous crime unless on presentment or indictment of a Grand Jury. The Constitutional provisions are reprinted in Appendix B, *infra*, page 1b.

Statement

Petitioner herein, a corporation, and the two defendants above named, officers of petitioner, were indicted on July 17, 1963 for violations of the Federal Food, Drug & Cosmetic Act, 21 USC 331(a) and (k), i.e. introduction into interstate commerce of misbranded drugs and causing a drug to be misbranded after it had been shipped in interstate commerce. Petitioner and the individual defendants were found guilty by a jury on five counts of the indictment and judgments of conviction were entered in the United States District Court for the Eastern District of Michigan, Southern Division. The individual defendants received jail sentences and substantial fines. The petitioner was fined $1,000.00 on each of the five counts for a total of $5,000.00,* plus the costs of prosecution under 21 USC 1918.

On July 26, 1968, the United States Court of Appeals for the Sixth Circuit reversed the judgments of conviction as to all defendants, including petitioner, holding that the evidence and leads obtained over petitioner's objection by compulsory interrogatories in a civil *in rem* action seeking forfeiture of petitioner's property should have been suppressed in a later criminal prosecution of the petitioner and the individual defendants, based upon the same basic facts where the Government had brought parallel civil proceedings and utilized discovery to obtain admissions to prepare the criminal case. In essence, the Court of Appeals held that a civil case and a criminal case, with the same facts, may not constitutionally go forward on a common front and be commingled under circumstances wherein a prospective defendant in a criminal case is

* The fine imposed upon the petitioner is erroneously referred to in the opinion of the Court of Appeals as $10,000.00. (Appendix A, *infra*, p. 29a.)

coerced into providing incriminating evidence for use in the criminal case under penalty of either giving the evidence or suffering a forfeiture of property.

On September 27, 1968, the Government petitioned the Court of Appeals for a rehearing, and on February 20, 1969, the Court of Appeals modified its prior opinion by affirming the judgment of conviction as to the petitioner herein and adhering to its prior decision reversing the judgments of conviction as to the individual defendants.

This is a petition for a writ of certiorari to review so much of the modified judgment of the United States Court of Appeals as affirmed petitioner's judgment of conviction.

The affirmance of the conviction as to the petitioner rests upon the proposition that the petitioner is a corporation as to which the Fifth Amendment privilege against self-incrimination is not available. Petitioner agrees that the Fifth Amendment privilege against self-incrimination applies only to natural persons and not corporations. *Campbell Printing Co.* v. *Reid,* 392 US 286 (1968). The point at issue in question 1, *supra,* however, is not petitioner's right to invoke the Fifth Amendment privilege against self-incrimination, but rather, petitioner's rights under the Fourth Amendment prohibiting unreasonable searches and seizures, and, alternatively, the Federal Court's supervisory authority to prevent the exercise of the Government's inquisitorial authority in a manner which is abhorrent to fair and civilized standards of procedures in the administration of criminal justice. *McNabb* v. *United States,* 318 US 332, 340-343; *Rea* v. *United States,* 350 US 214, 216-217.

The issue sought to be reviewed by question 2 *supra,* deals with the practice whereby the Grand Jury process has become a mere rubber stamp for what the prosecutor has already determined, and the limitations, if any, which

the *Costello* and *Lawn* decisions of this Court have placed upon the authority of the District Courts to dismiss indictments which rest exclusively upon illegally obtained evidence or which are not supported by evidence.

The issues sought to be reviewed by questions 3 and 4 *supra,* deal with electronic eavesdropping of business premises where there has been a physical intrusion by law enforcement officers prior to the time the premises were opened to the public and the admissibility of tape recordings of public utterances obtained as a direct consequence of the unlawful trespass.

The contentions urged in questions 2 and 3 were presented to the Court of Appeals which apparently rejected them without comment.*

Facts

Prior to the present indictment, a civil *in rem* action was brought by the Government seeking the condemnation of various drugs on the ground that they were misbranded and violative of the Federal Food, Drug & Cosmetic Act, 21 USC 331(a) and (k). In its conduct of the civil action, the Government served written interrogatories consisting of approximately 1300 questions seeking comprehensive and detailed information and *admissions* about the petitioner and the activities of the individual defendants in connection with the petitioner's business (see certified copy of Appellants' Supplemental Appendix), including without

* The first opinion of the Court of Appeals which was superseded and expunged by its second opinion contains the following statements: "Several grounds of assigned error were argued in briefs, but we consider it necessary to discuss only one". (Appendix A, *infra,* page 20a) . . . "We observe for the benefit of the Trial Judge and counsel in the event of another trial that we find no merit in the other grounds assigned as error by the defendants". (Appendix A, *infra,* page 27a). The second and only official opinion of the Court of Appeals makes no mention of the other grounds of assigned error.

limitations, *admissions* as to every aspect and element which formed the subject of the criminal case, such as matters of interstate commerce, labelling, status and relationship of the individual defendants to the petitioner, and all facts relative to the issue as to whether the drugs were misbranded in violation of the Act (56a-62a; 731a-766a).*

Almost simultaneously with the service of the interrogatories, the Government served notice upon petitioner and the individual defendants, pursuant to Section 305 of the Act and as a prerequisite to the filing of a criminal case, that investigation of the 'defendants' acts indicated their responsibility for criminal violations of the Act and that criminal action was contemplated. Petitioner and defendants filed objections to being required to answer the interrogatories and moved to stay the civil proceedings pending the outcome of the contemplated criminal action on the ground that the Government was attempting, through the use of interrogatories, to obtain information not ordinarily available to it for use in the criminal action which the Government was planning against the defendants. The objections and motion were denied by the District Judge who reasoned that the defendants would not necessarily be prejudiced since there was no certainty when, or if, a criminal action would be brought. The defendants were then ordered to file answers to the interrogatories or suffer a forfeiture of their property. The civil action was thereafter terminated by a consent decree in which the Government agreed that the entry thereof would not constitute an admission that the Act had been violated.

Petitioner and the individual defendants were thereafter indicted on the same acts of alleged wrongdoing set forth in the civil action. Prior to the trial of the criminal case,

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* References to "a" pages refer to petitioner's appendix to the Court of Appeals which was filed with this Court for use on this proceeding.

the defendants moved to quash the indictment and to suppress all evidence and leads obtained by the Government by compulsory discovery in the civil action. The Trial Judge granted a hearing on the motions and thereafter denied them. At the hearing, it was developed that the civil case and the investigation of the criminal case had gone forward on a common front, and that, indeed, the investigation of the civil and criminal case were one and the same investigation and part of one file. Everything obtained in the civil case was included in the criminal file and forwarded through Government channels for use in the criminal case. It was further established that the interrogatories were prepared by an official of the Food and Drug Administration in Washington who made the initial decision to recommend criminal action against the defendants, that the decision was not made until after the answers to the interrogatories had been forwarded to that official and that, in fact, the indictment was prepared in that official's office (80a-102a). In short, the evidence was clear, convincing and overwhelming that the Government had filed the interrogatories to obtain answers to assist it in the preparation of the criminal case, had in fact utilized such answers to prepare the criminal case, and that the interrogatories had been prepared by, the answers submitted to, and the decision to prosecute made by, the very same person!

With respect to the proceedings before the Grand Jury, the record shows the following:

None of the books or leaflets allegedly constituting the labelling material and none of the lectures delivered by the individual defendant Kordel, which formed the heart of the Government's case, were submitted to the Grand Jury. No experts were called to testify as to the truth or falsity or adequacy of the directions for use of the labelling and, indeed, not even the products were exhibited to

the Grand Jury. In short, no evidence was presented, no witness who could testify as to the facts, and no books, records or papers were submitted to the Grand Jury. In fact, not even a court reporter was present and no transcript of minutes was made, obviously because there was nothing to transcribe * (93a-100a).

All that occurred was that the Deputy Director of the Detroit Office of the Food and Drug Administration entered the Grand Jury room armed with the proposed indictment which had been prepared by his FDA associate who had also prepared the interrogatories, received the answers and recommended the indictment; that the Deputy Director used the answers to the interrogatories in his statement to the Grand Jury, remained a short while, and left (72a). The Grand Jury session lasted less than 20 minutes, hardly enough time to read, much less understand, the indictment. A true bill, identical to the indictment carried into the Grand Jury room by the Deputy Director and prepared by his associate, was immediately returned (95a, 99a).

While the Trial Judge was disturbed by the irregularities in method and time which were shown to have occurred in the instant case (111a), he denied the motion to dismiss the indictment on the theory that this Court's decisions in the *Costello* and *Lawn* cases precluded him from dismissing an indictment under any and all circumstances and prohibited any inquiry into the evidence before the Grand Jury—even where the indictment rested almost exclusively on illegally obtained evidence, where no evidence or rationally persuasive evidence had been presented or even where the "witness" in reality assumes the role of the prosecutor. In effect, the District Court construed this Court's holdings in *Costello* and *Lawn* as sanctioning the

* The only record of the Grand Jury proceedings was a looseleaf book notation reading as follows: "7-17-63 Lelord Kordel, George Fowler, Alfred Feldton, T. Bill (17)." (100a)

all too frequent practice wherein grand juries merely rubber stamp what the prosecutor has already determined (107a-111a).

Not only did the Government here abuse its inquisitorial authority by utilizing discovery procedures available in the civil case to obtain evidence not otherwise available in the criminal case, but engaged in other excessive and irregular investigative techniques involving electronic eavesdropping. The pertinent and undisputed facts concerning this electronic eavesdropping are as follows:

The indictment herein alleged that the products were misbranded in that their labelling failed to bear adequate directions for use for the purposes for which the products were intended to be used as manifested in various lectures sponsored by the petitioner and delivered by the individual defendant Kordel. The Government sought to prove the contents of the lectures by tape recordings made with electronic recording equipment placed upon defendants' business premises by means of a trespass prior to the time the business premises had been open to the public and the lectures delivered.

Thus, FDA agents testified that certain premises of the Fort Wayne Hotel had been leased to the defendants and that before the lectures were open to the public the agents entered upon the premises, dropped a microphone down an air vent which was in the ceiling of the premises directly in front and above the lecture stand, ran wires out of the windows and across the roof of the second floor, and connected the wires to a tape recorder which had been set up in other rooms of the Hotel. The record further shows that the agents had gained access to the defendants' leased premises before they were open to the public by flashing official credentials to the Assistant Manager of the Hotel and that they had entered the premises on another occasion prior to the time they were open to the public.

The agents confirmed that the eavesdropping equipment was Government owned (255a-267a).

A similar access was made with respect to defendants' business premises in the Masonic Temple. There, an FDA agent entered defendants' leased premises before they were open to the public, obtained a tape recorder from the manager of the building and placed it in the manager's office which was in a room separate and apart from defendants' business premises (225a-227a).

Objection to the receipt in evidence of the recordings obtained in the foregoing manner was made to the Trial Judge on the ground that they were procured in violation of petitioner's and defendants' constitutional rights under the 4th Amendment to be free from unreasonable searches and seizures (227a-260a). The Trial Judge denied the motion on the ground that the receipt in evidence of the recordings obtained in the manner aforementioned did not violate the defendants' constitutional rights, notwithstanding that the recordings were obtained as a direct consequence of an unlawful trespass and physical intrusion into defendants' business premises (231a, 260a-261a; 731a-733a).

Reasons for Granting the Writ

A. Introduction

Petitioner respectfully submits that *certiorari* should be granted in that basic constitutional questions are presented involving petitioner's rights under the Fourth Amendment. The instant case is one of public importance in that it presents a recurring question of the authority of the Food and Drug Administration to bring parallel civil proceedings to avail itself of the almost unlimited opportunity, via compulsory discovery, to extract admissions tantamount to a confession from the other party to the civil proceeding, to prepare a criminal case. As

such, there is also here involved the authority of the Federal Court to supervise the fair administration of criminal justice and to formulate exclusionary rules governing the admissibility of evidence in federal criminal trials with considerations of justice not limited to strict constitutional standards.

Certiorari is also necessary to clarify the scope of this Court's holdings in *Costello* and *Lawn* concerning the authority of the District Courts to dismiss indictments which have been procured by the recurring practice whereby Grand Juries merely rubber stamp a prosecutor's proposed indictment. There is also involved that portion of the Fifth Amendment which prohibits the holding of any person for an infamous crime, except upon presentment and indictment of a Grand Jury. In this connection, it would appear that a conflict exists between the Court of Appeals for the Second Circuit and the Sixth Circuit concerning the authority of the District Court to dismiss an indictment predicated exclusively on inadequate or illegally obtained evidence.

B. Reasons for Granting Writ as to Question 1

There is here involved a shocking example of agency abuse of inquisitorial authority in a parallel civil case to obtain evidence to commence and prosecute a criminal action on the same facts. This case, as far as the corporate petitioner is concerned, does not involve testimonial compulsion in violation of the Fifth Amendment privilege against self-incrimination not available to a corporation, nor is there here involved a subpoena of corporate books and records which disclose incriminating information. Rather, this case deals with a violation of the search and seizure provisions of the Fourth Amendment as real and unreasonable as if agency officials had physically and warrantlessly intruded upon petitioner's business premises to seize corporate property or extract testimonial admissions.

As stated in *United States* v. *Guerrina*, 112 F. Supp. 126, 129 (DCED, Pa.):

> "I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call, and a search for criminal purposes conducted under the guise of an examination for purely civil purposes."

See also:

Boyd v. *U. S.*, 116 US 616, 635;*
U. S. v. *Lipshitz*, 132 F. Supp. 519 (EDNY, 1955);
U. S. v. *Parrott*, 248 F. Supp. 196 (DC, Dist. of Col., 1965).

The procedure followed by the Food and Drug Administration in the instant case of utilizing compulsory discovery to gather admissions and evidence for a criminal case is not an isolated occurrence. Indeed, an FDA agent testified that it is a "matter of routine" that what is uncovered in a civil FDA case is used in the criminal prosecution (85a). As such, there is here involved an issue of recurring significance in the administration and enforcement of the agency's statutory authority to redress alleged violations of the Federal Food, Drug and Cosmetic Act by civil and criminal sanctions.

In fact, similar procedures involving the administration of the Federal Securities Laws, Tax Laws and Anti-trust Laws, have received severe censure by the Courts, i.e. the Courts have struck down the use by these agencies of a parallel civil case to obtain, by compulsory discovery, information to commence and prosecute criminal violations for

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* The *Boyd* case was premised not only upon the Fifth Amendment privilege against self-incrimination, but upon the Fourth Amendment as well, which is applicable to corporations.

the same offense. See: *U. S.* v. *Parrott, supra; U. S.* v. *Lipshitz, supra; U. S.* v. *Thayer,* 214 F. Supp. 929 (D. Colo., 1963); *U. S.* v. *Cigarette Merchandisers Association,* 18 FRD 497 (SDNY); *U. S.* v. *Linen Supply Institute,* 18 FRD 452 (SDNY); *U. S.* v. *Maine Lobsterman's Ass'n.,* 22 FRD 199 (D. Me); *U. S.* v. *A. B. Dick,* 7 FRD 442 (ND, Ohio).

Petitioner does not contend that the FDA may not exercise its statutory authority to bring civil and criminal cases to redress alleged violations of the Food, Drug and Cosmetic Act. Petitioner contends only that the FDA may not use evidence against a defendant in a criminal case which has been coerced from him by compulsory discovery in a parallel civil case under penalty of either supplying the evidence or suffering a forfeiture of his property. Such a procedure is an unreasonable search and seizure and, moreover, involves an abuse of prosecutorial responsibility which should not be sanctioned by the Court.

Certiorari should be granted to harmonize the competing and conflicting interests as between the agency's statutory authority, on the one hand, and petitioner's right, on the other hand, to be free of inquisitorial procedures which are abhorrent to fair and civilized standards of criminal justice. This issue is one of first impression which has not been, but should be, settled by this Court. Further, the procedures utilized by the Food and Drug Administration in the administration of its statutory authority so far departs from accepted and usual course of judicial proceedings in criminal cases as to call for the exercise of this Court's power of supervision.

C. Reason for Granting Writ as to Question 2

Question 2 presents an issue of recurring significance and conflict between the Second and Sixth Circuit Court

of Appeals regarding the scope and application of this Court's holdings in *U. S.* v. *Costello,* 350 US 359; and *Lawn* v. *United States,* 355 US 339, and the place which the Grand Jury system holds as an instrument of criminal justice for all persons accused of serious crimes.

In actual practice, all too many Grand Jury's merely rubber stamp what the prosecutor has already determined. (See note: *The Grand Jury—Its Investigatorial Powers and Limitations,* 37 Minn. L. Rev. 586.) It would be well, therefore, for this Court to delineate the role of our Grand Jury system as an instrument of justice and to clarify the authority of the District Courts to dismiss indictments where the evidence before the Grand Jury rests exclusively either upon illegally obtained evidence, or no evidence, or no substantial, rationally persuasive, or patently inadequate evidence.

In *U. S.* v. *Tane,* 329 F. 2d 848 (CA 2, 1964) the Court of Appeals for the Second Circuit held that the *Costello* doctrine does not preclude the dismissal of an indictment which rests almost exclusively on illegally obtained evidence. The Court of Appeals for the Sixth Circuit, on the other hand, in the case at bar, has apparently held to the contrary. Here, the District Court's denial of petitioner's motion to dismiss the indictment stems from the Trial Judge's opinion that the *Costello* doctrine precluded him from dismissing an indictment under *any* and *all* circumstances—even where it was founded upon illegally obtained evidence, or where no evidence or rationally persuasive evidence had been presented. In rejecting this ground for petitioner's appeal, the Court of Appeals has accepted the District Court's rationale and thus is apparently in direct conflict with the Second Circuit.

In the case at bar, the only evidence before the Grand Jury was testimony of an FDA official who entered the

Grand Jury room armed with the very indictment prepared by his associate which was ultimately returned by the Grand Jury.

Surely, an FDA agent entering the Grand Jury room would not be expected to present to the Grand Jury, as an alleged "witness", the very same indictment which the United States Attorney was seeking to obtain. Such a "witness" is not a witness at all, but a prosecutor in the very same sense as if the United States Attorney had entered the Grand Jury room, read the indictment, and requested its return.

But even if the FDA agent could be deemed a "witness", the record is undisputable that his testimony consisted merely of the answers to the interrogatories coerced from petitioner in the civil case in the manner above described. There is no issue here presented as to whether petitioners are entitled, as a matter of due process, to a hearing to determine whether evidence obtained in violation of petitioner's rights was, in fact, used before the Grand Jury (*Lawn* v. *U. S., supra,* at page 350).

Here, no hearing is necessary as the facts clearly established that the Grand Jury which returned this indictment made direct and derivative use of materials and information which had been unlawfully obtained and coerced from petitioner and that the indictment rested solely upon such evidence.

The concurring opinion of Mr. Justice Burton in *Costello* points out that the *Costello* doctrine does not go so far as to authorize the return of indictments in the absence of any evidence or any rationally persuasive evidence. Except for Mr. Justice Burton's comment, however, this Court has not clarified, delineated or articulated

the scope and breadth of the *Costello* holding where indictments are returned either without rationally persuasive evidence to support it or which rest exclusively upon illegally obtained evidence.

Question 2 thus presents this Court with the opportunity to lay at rest a troublesome problem of recurring and substantial significance involving an accused's rights under the Fifth Amendment's requirement of indictment by grand jury. The Grand Jury system was adopted, designed, and its most valuable function is "not only to examine into the commission of crimes, but to stand between the prosecution and the accused and to determine whether the charge was founded upon credible testimony . . .". *Hale* v. *Henkel,* 201 US 43, 59. "(It is) a means not only of bringing to trial persons accused of public offenses upon just grounds, but also a means of protecting the citizen against unfounded accusations." *Ex parte Bain,* 121 US 1. The Grand Jury's duty to investigate and protect an accused requires careful deliberation upon the solemnity of an oath that there is good reason for his accusation and trial, and that duty is not performed unless and until every clue has been run down, all witnesses searched for and examined in every proper way. *Ex parte Bain, supra,* at page 11; *U. S.* v. *Collins,* 272 F. 2d 650 (CA 2, 1959), cert. den. 362 US 911.

The important role of our Grand Jury system as an instrument of justice has been eroded by government prosecutors who all too frequently prepare the indictment for submission to the Grand Jury which then merely rubber stamps it in hasty and almost cavalier fashion. In effect, the grand jury system has been read out of our Constitution by practices of which the instant case is merely illustrative. The time has come, if it has not long since passed, wherein this Court should once again re-

affirm the principles underlying our grand jury system in the light of the *Costello* and *Lawn* holdings, so that persons aggrieved by irregular and unconstitutional grand jury practices may seek redress at the Trial Court level.

D. Reason for Granting Writ as to Question 3

The facts herein show that FDA agents entered petitioner's business premises before they were open to the public, placed electronic eavesdropping equipment thereon, and thus trespassed and intruded upon petitioner's business premises. The exclusionary rule fashioned by this Court in *Weeks* v. *U. S.*, 232 US 383; *Mapp* v. *Ohio*, 367 US 643; *Silverthorne Lumber Co.* v. *U. S.*, 251 US 385, 391-392; *Silverman* v. *U. S.*, 265 US 505; and *Katz* v. *U. S.*, 389 US 347, excludes from a criminal trial evidence or fruits of evidence obtained from a defendant in violation of his 4th Amendment rights. *Alderman* v. *U. S.*, US , 22 L. ed 2d, 176 (1969). Consequently, the tape recordings obtained from petitioner by means of the unlawful trespass and intrusion should have been suppressed. Under this Court's recent decisions in *Schipani* v. *U. S.*, 385 US 376 (1966); *Black* v. *U. S.*, 385 US 26, and *O'Brien* v. *U. S.*, 386 US 345, the use of a concealed monitoring device is sufficient, in and of itself, to require a new trial whether or not the tainted evidence was used. If that is so, then here, where the evidence was in fact used, a new trial should be granted. Moreover, it is immaterial that the recordings were made of public lectures, the contents of which might have been obtained through lawful means. As petitioner reads this Court's decisions, what is at the heart and core of the Fourth Amendment protection is the existence of a trespass, i.e. an unlawful invasion and intrusion upon a citizen's personal or property rights and/or the installation of secret electronic

monitoring devices whether or not the evidence so obtained was used. This Court previously has dealt only with electronic eavesdropping of private conversations. It has not previously passed upon the issue here presented, namely, whether an unlawful trespass and intrusion on business premises can be utilized to obtain a recording of non-private conversations. Unless an exclusionary rule is fashioned under such circumstances, this Court will have sanctioned respect for lawless police action. The only remedy to deter lawless intrusions into private or business premises is to exclude evidence obtained by such means. "Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good and only when that point is driven home can the prosecutor be expected to emphasize the importance of observing Constitutional demands in his instructions to the police." *Wolff* v. *Colorado,* 338 US 25, 44; *Weeks* v. *U. S.,* 232 US 392, 393.

In the instant case, there was absolutely no excuse or justification for Federal agents to break into petitioner's business premises since the evidence sought could very easily have been obtained by lawful means. Indeed, this very fact compels the conclusion that the lawless trespass and intrusion should not be validated.

E. Reason for Granting Writ as to Question 4

In the instant case, it is undisputed that electronic surveillance equipment was placed upon and functioned in petitioner's business premises prior to the time the premises were open to the public. As such, petitioner is entitled to a remand to the District Court for proceedings consistent with this Court's opinion in *Alderman* v. *United States, supra.* The remand to the District Court will re-

solve the question of whether such unlawful surveillance resulted in any conversations which may have been monitored through that surveillance which were relevant to petitioner's conviction. The granting of *certiorari* to review this aspect of the instant case will assure petitioner of the rights recognized by this Court in the *Alderman* case.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

Dated: April 17, 1969

APPENDIX A

Opinion of the District Court

(Filed June 3, 1965)

FREEMAN, District Judge.

In this criminal prosecution under the Federal Food, Drug and Cosmetic Act alleging violations of 21 U. S. C. §352(a) and §352(f)(1) of the Act by reason of "misbranding" certain articles, defendants now move to suppress any evidence obtained by the Government as a result of discovery proceedings in the earlier civil case of *United States* v. *An article of drug* * * * *Korleen Tablets, etc.*, Civil No. 20215 in this Court.

In the earlier civil case, a condemnation proceeding against the allegedly misbranded drugs in question, in which case the defendant, Detroit Vital Foods, Inc., in the instant criminal case intervened and filed claim to the seized goods, the Government on January 6, 1961, filed extensive interrogatories seeking details of claimant's business activities, and on January 19, 1961, commenced a proceeding under 21 U. S. C. §335 preliminary to the bringing of a criminal action, giving claimant, Detroit Vital Foods, Inc., a notice of hearing to present its views with respect to such contemplated criminal proceeding. In April, 1961, claimant moved to stay the civil proceedings and filing of answers to interrogatories until after the disposition of the threatened criminal action on the ground that the Government was attempting to obtain information not ordinarily available in a criminal case by means of civil discovery procedure. In a Memorandum and Order by Judge Levin on June 21, 1961, the motion was denied.

Judge Levin noted that criminal action might never be taken at all and stated further:

> "The government could obtain data for a criminal prosecution from the testimony elicited during the trial in this civil action or through subpoenaing books and records of the claimant. Therefore, it does not seem to be in the interests of justice to deny such information to the Government because it seeks it by way of the discovery procedures."

Thereafter, defendant corporation answered the interrogatories, which were signed by individual defendant Alfred Feldten, Vice-President of the corporation.

Defendants' motion to suppress claims that the use in this criminal case of evidence obtained in the civil case violates defendants' right to a fair trial, constitutes an unconstitutional exercise of inquisitorial authority, and violates civilized standards of procedure in the administration of criminal justice. Defendants also request a hearing to determine the date on which the Government actually decided to initiate a criminal prosecution.

More specifically, defendants claim that the use of the evidence obtained in the civil case violates the Fifth Amendment privilege against self incrimination, and especially the Fourth Amendment right against the use of evidence obtained by unreasonable search and seizure. Defendants place primary reliance upon *Boyd* v. *United States,* 116 U. S. 616, which was a civil seizure action to declare a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon. The trial court ordered claimants of the goods to submit invoices for discovery under a statute authorizing such discovery and providing that failure to comply would con-

stitute confession of the allegations stated. The court struck down the statute, holding:

> "* * * we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment."

The Government contends in its brief that the *Boyd* case is inapposite, in that the court limited its ruling to private books and papers of the owner, who was an individual rather than a corporation. It is true that the precise holding was limited to private books and papers of an individual. However, other language in the *Boyd* case suggests that the holding was placed on a broader basis than the Fourth Amendment and would also apply to bar the use in evidence in a criminal action of compelled discovery of admissions in a civil action concerning the same transaction. Thus, the court stated:

> "Now, it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government."

The information obtained by the use of interrogatories in civil action #20215 was not confined to information which was obtainable from examination of corporate books

and records which were subject to subpoena. The interrogatories called for admissions by the corporation as well. As such they constituted "a discovery which might tend to convict the party of a crime" and "compulsory discovery by extorting the party's oath." Thus, under the broad language of the *Boyd* case, the use of the admissions obtained by discovery in the civil action may well be barred by the Fourth Amendment from use as evidence in the criminal case.

The Government cites *Essgee Company* v. *United States,* 262 U. S. 151 (1923), for the proposition that a corporation is not protected by the Fourth Amendment from the subpoena of its books and records by a grand jury in a criminal case. The Court expressly distinguished the *Boyd* case as involving an unreasonable search and seizure of documents and records of an individual and noted "the more limited application of the Amendments to the compulsory production of corporate documents and papers * * *." Defendant concedes that *Essgee* and other cases such as *United States* v. *White,* 322 U. S. 694 (1944), limit the holding in *Boyd* with respect to corporate books and records. However, defendant contends that these cases do not limit *Boyd* with respect to admissions obtained by compulsory discovery in a related civil action. It is true that *Essgee* makes no reference to admissions by discovery, but it is also true that *Boyd* makes only indirect reference to admissions without expressly holding that they are barred by the Fourth Amendment from use in evidence in a criminal case.

Insofar as the answers to interrogatories in the civil case supplied information obtainable from corporate books and records which were subject to subpoena in any event in criminal proceedings, the use of such information cannot

be said to be the result of an unreasonable search and seizure within the meaning of the Fourth Amendment, in view of the holding in *Essgee* that the Fourth Amendment does not protect the corporation from subpoena of its books and records in a criminal case. Whether the use of admissions not obtainable from corporate books and records is barred by the Fourth Amendment is a more difficult question not resolved by that case.

Both the Government and defendants rely on *Abel* v. *United States*, 362 U. S. 217 (1960), in support of their positions. The Government claims that *Abel* stands for the proposition that evidence obtained by virtue of lawful civil process is admissible in a subsequent criminal case. Defendants claim that *Abel* condemns the use of lawful civil process as a method of obtaining evidence in the preparation of a criminal case. In *Abel*, the Supreme Court held that a search and seizure incidental to an arrest of an unregistered alien pursuant to an administrative warrant for deportation by administrative authorities from the Immigration and Naturalization Service did not constitute an unreasonable search and seizure under the Fourth Amendment, since the record did not establish bad faith by the Government in using an administrative arrest as a method of gathering evidence for a criminal prosecution for espionage. Thus the effect of the holding was to allow in evidence in the criminal prosecution, material seized incident to the administrative arrest. However, the Court clearly predicated its holding upon a finding that the Government did not in the particular case use the administrative warrant as an improper instrument of the F. B. I. in obtaining evidence for a criminal prosecution, contrary to appellant's claim. The Court stated:

> "Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing

> officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and resrictions of the Constitution and laws of the United States."

The Court stated further (p. 230):

> "We emphasize again that our view of the matter would be totally different had the evidence established, or were the courts below not justified in not finding, that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding. *The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime.*" (Emphasis added)

In *Abel*, the dissenting opinion (four Justices) was of the view that the Fourth Amendment does not permit an unconfined search of the premises "upon a purely executive arrest." Justices Black and Douglas, in a separate dissenting opinion, concluded that the record established bad faith by the Government in the particular case.

In the instant case, defendants contend that the Government was contemplating criminal proceedings at the time interrogatories were filed in the civil action. If, in fact, the decision to institute the civil action and to file interrogatories "was influenced by, and was carried out for, a

purpose of amassing evidence in the prosecution for crime," within the language of the test as announced in the *Abel* case, then evidence procured by admissions in answer to the interrogatories must be suppressed.

On oral arguments of the motion to suppress, the United States Attorney expressed his willingness, in light of the *Abel* case, to have a hearing to determine the Government's motive in instituting the civil action.

In order to determine whether the Government was proceeding in good faith when it filed the interrogatories, a hearing as requested by defendants must be held. An appropriate order may be submitted.

/s/ RALPH M. FREEMAN
United States District Judge

Dated: June 3rd, 1965.

District Court's Ruling on Motion to Suppress Evidence Obtained Through Compulsory Interrogatories

[337] The Court: This hearing was held pursuant to a request of the defendants in their motion to suppress evidence filed in this case on March 22, 1965. The request for the hearing was the alternative relief prayed for in that motion, which came on for hearing before this court on April 21, 1965. The motion was orally argued on that date and taken under advisement.

The Court filed a memorandum opinion dated June 3, 1965, and in that opinion granted the alternative relief requested by the defendants to determine whether the Government was proceeding in good faith when it filed the interrogatories in the civil suit, which is Case No. 21025 in this court, a proceeding before Judge Levin.

At the outset of this hearing, counsel for the defendants requested that the inquiry be broadened to include not only the filing of the interrogatories in that civil suit, but the filing of the suit itself; and the Court accepted that request and the hearing has been conducted covering the entire proceedings in that civil case. So that I now have before [338] me the issue of whether or not the Government was proceeding in good faith in filing of the civil suit and all proceedings thereunder, and particularly the filing of the interrogatories in that case. As a matter of fact, this proceeding seems to have narrowed down pretty well to whether or not the Government was acting in good faith in filing the interrogatories in the civil suit.

This case is scheduled for a jury trial to commence next week Tuesday, being August 10, 1965. This is almost four-thirty on Friday afternoon preceding that date. I do not have before me the communications between my office and the Government and defense counsel with re-

spect to the date set for this hearing, but in any event, the hearing was scheduled to commence on Wednesday of this week, being August 4th, and notice was given of this date by my Clerk some time ago.

In any event, the hearing has been held. Three days have been devoted to the hearing, and in the opinion of this Court, both the defendants and the Government have been given full opportunity to present all witnesses and all testimony that they desired to present that is or are relevant to the point here in issue.

I shan't attempt to review all of the evidence in this case. But having considered the evidence carefully and all the arguments of [339] counsel, and having read the rather numerous and sometimes lengthy exhibits offered in evidence, this Court is unable to find that the Government acted in bad faith in instituting the civil suit or in filing the interrogatories here in question; or more precisely, in the language of the Abel case, which was relied upon by both the Government and the defendants in the arguments on the motion to suppress, which I have already referred to, this Court does find that the civil action and the interrogatories filed in that action were not taken or filed for the purpose of amassing or procuring evidence to be used in the instant prosecution. In the Abel case, the Court stated:

> "'The test is whether the decision to proceed administratively toward deportation was influenced by and was carried out for a purpose of amassing evidence in the prosecution for crime.'"

Now, there, of course, the court was dealing with action taken by an administrative agency, and here the Court is

dealing with the investigation and recommendations of an administrative agency which, however, finally resulted in a civil case filed by the Government to condemn certain matter alleged to be drugs within the meaning of the statute.

It is true, as the Government has argued in this case, that the Food and Drug Administration are charged with the responsibility of investigating violations of the Food and Drug laws, and the testimony in [340] this case shows that very often that department proceeds both civilly and criminally because of the public interest. That is, that they may recommend forfeiture of the drugs involved, and in the civil injunctive process, to restrain the further use or sale, and so forth, of such material while at the same time considering the need for criminal prosecution.

Now, the mere fact that the agency may be proceeding along both lines simultaneously, in the opinion of this Court, is only a circumstance from which in a proper case it might be found that the decision to institute the civil proceeding or anything pursuant to the civil proceeding, such as the interrogatories here in question, was influenced by and carried out for the purpose of procuring evidence for the criminal case.

The testimony in this case shows—and it is not contradicted—that the Food and Drug Administration—more specifically, Mr. Randolph of the Washington office of that agency, had evidence before him which had been procured by the investigative agencies which he at least said was adequate to establish all of the elements of the criminal offense without resorting to the information which might be procured by the requests for admissions or interrogatories.

District Court's Ruling on Motion to Suppress Evidence, etc.

Now, the purpose of requests for admissions and interrogatories is too well known to take the time to detail here in connection [341] with this matter, but it is true, as one of the attorneys has testified, that at least one of the purposes of procuring information by requests for admissions and interrogatories is to not only narrow the issues, but to lay the foundation for a motion for summary judgment. And in a civil proceeding, this Court knows, as I think does every court, that another purpose of the use of such discovery proceedings is to eliminate the need for producing witnesses, and thereby saving time and expense of producing what is sometimes a large number of witnesses who may be called from distant points and which would require considerable time of the court to establish a matter which may be admitted by the claimant in a civil proceeding.

I cannot infer from the testimony in this case that the mere use of the interrogatories was used to procure evidence which was not otherwise available to the Government to use in establishing some one or more of the elements in the instant prosecution.

For these reasons, the Court concludes that the Government did not act in bad faith in starting the civil suit or in filing the interrogatories; and therefore the request to suppress the evidence, under the tests laid down in the Abel case, is denied. An order may be submitted.

* * *

Trial Court's Ruling on Motion to Quash Indictment

[2] Detroit, Michigan
Monday, August 9, 1965
2:15 o'clock P.M.

• • •

[41] The Court: All right.

The decision of the motion in this case is controlled by the decision of the United States Supreme Court in the case of Costello v. United States reported in 350 U. S. at page 359, where the court, speaking through Mr. Justice Black, in a unanimous opinion except for a concurring opinion by Mr. Justice Burton, who did concur at least in [42] the result, and presumably in all that the majority of the court stated, and where the court in its opinion at page 362, 363, and 364, without reading all of the opinion, those portions of the opinion on those pages, said:

> "But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act."

And then continuing on the same page, the court continues:

> "And in 1852 Mr. Justice Nelson on circuit could say 'No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof . . .'"

citing U. S. v. Reed, 27 Federal Cases 727.

Trial Court's Ruling on Motion to Quash Indictment

And then the court in Costello continues on page 363 as follows:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could [43] always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

And continuing from that point, the court says:

> "Petitioner urges that this Court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add [44] nothing to the assurance of a fair trial."

Trial Court's Ruling on Motion to Quash Indictment

And then it appears that Mr. Justice Clark and Mr. Justice Harlan took no part in the consideration or decision of the case, and Mr. Justice Burton wrote a concurring opinion in which he set forth the language upon which Mr. Friend seems to largely rely here today.

But significantly, no other member of the court joined with Mr. Justice Burton in that concurring opinion, and I think I should also point out that the present court is now constituted of the six members who participated in the majority opinion—Chief Justice Warren, and, of course, Mr. Justice Black, who wrote the opinion, and Mr. Justice Douglas, and Mr. Justice—well, Justice Clark didn't take any part in the opinion, and Mr. Justice Harlan—no, Justice Harlan didn't participate. But of the present court as now constituted, four members of the court participated in the majority opinion, and it is also significant that Mr. Justice Frankfurter also was a member of the majority who participated in that opinion, all of whom, I think we can agree, are and have been over the years very much concerned with the individual rights and the strict protection of constitutional rights of a defendant.

The Supreme Court, in the later case of Lawn v. United States, reported in 355 U. S. at page 339, in discussing this same proposition, reiterated and reaffirmed the language and the holding in [45] Costello, and said at page 349 of the opinion in that case:

> "Moreover, this Court has several times ruled that an indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment. In *Holt*

> v. *United States,* 218 U. S. 245, this Court was required to decide whether an indictment should be quashed because procured in part by incompetent evidence of an admission by the accused, aside from which 'there was very little evidence against the accused.' This Court refused to hold that such an indictment should be quashed, stating: 'The abuses of criminal practice would be enhanced if indictments could be upset on such a ground.' In *Costello* v. *United States,* 350 U. S. 359, this Court squarely faced and decided the question, saying:"

and the Court in Lawn quotes language from Costello which I have already referred to.

The Second Circuit, in the case of the United States v. Ramsey, 315 F. 2d at page 199, which was a case decided in 1963, in [46] a per curiam opinion by Chief Judge Lumbard and Judges Clark and Marshall, said:

> "As to defendant's second contention, that there was no valid evidence before the Grand Jury upon which an indictment could be founded, the decision in Costello v. United States, 350 U. S. 359, precludes by very broad language any judicial inquiry into the sufficiency of the evidence before a Grand Jury."

Now, it seems to me, regardless of any personal views I might have about this matter or the length of time that was required to present this matter to a grand jury, and the role played by the person who took the matter to the grand jury—and when I say that, I am referring, of course, to Mr. Fowler—I think the law is very clear—I think it is crystal clear—that the issue raised by this motion is controlled by the two decisions of the United States Supreme Court in Costello and Lawn.

Motion for Judgment of Acquittal or New Trial

Now, as for the contention that Mr. Fowler was not a witness, I can't accept that, just because he happened to be in charge of the investigation and was active in both the civil and criminal aspects of the matters here involved. Neither could I find that he was in a personal sense biased or prejudiced.

But in any event, I don't think that would make a bit of difference, because I think the references to bias and prejudice relate [47] to the grand jury, and not the witness, and it would be for the grand jury to decide for themselves whether a witness was biased or prejudiced so as to destroy or weaken the testimony he might give.

For these reasons the motion is denied.

* * *

Motion for Judgment of Acquittal or New Trial

Defendants further contend in support of their motion for a new trial that the Court erred in allowing certain evidence and lines of questioning despite defendants' objections. More specifically, defendants contend that the Court erred in overruling objections to evidence procured by allegedly illegal trespassing upon defendants' hotel premises, and allegedly illegal use of electronic eavesdropping equipment to record lectures by the defendant Kordel in Detroit, in violation of the Fourth Amendment. Defendant also contends the Court erred in permitting a line of questioning concerning the truth or falsity of statements contained in Kordel's lectures.

As for defendants' challege to evidence allegedly obtained in violation of the Fourth Amendment, the Court

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at trial denied defendants' motion to suppress such evidence on the merits of the constitu- [2958] tional issue and also for failure to timely file the motion, as required by Rule 41(e) of the Federal Rules of Criminal Procedure.

The case of On Lee v. United States, 343 U. S. 747, in which the transmission of a conversation with the defendant by a hidden radio receiver was held not to be an unreasonable search and seizure, appeared to the Court at trial and still appears to govern this case. Defendants attempted at trial to distinguish the On Lee case on the ground that in the instant case the recording was not made with the implied consent of the lecturer.

The distinction is unpersuasive, since in both cases the reception of defendant's statements occurred in a place open to the public. Indeed, the instant case is an even weaker case on its facts than On Lee for a Fourth Amendment violation, since the defendant Kordel's statements electronically recorded were offered as a public lecture open to anyone, unlike the distinctly private conversation of On Lee. The secret recording of a public lecture is certainly as much with the implied consent of the lecturer as the secret transmission of a private conversation in a public place.

Opinion of United States Court of Appeals For the Sixth Circuit

Decided July 26, 1968.

Before: O'Sullivan and Combs, Circuit Judges, and Cecil, Senior Circuit Judge.

Combs, Circuit Judge. The defendants were found guilty by a jury on five counts of an indictment charging them with introduction into interstate commerce of misbranded drugs and with causing a drug to be misbranded after it had been shipped in interstate commerce. 21 U.S.C. § 331(a) and (k). The defendant Kordel was sentenced to two years imprisonment and to a fine of $10,000.00. The defendant Feldten was sentenced to one year imprisonment, suspended to thirty days with three years probation, and to a fine of $2,000.00. A total fine of $10,000.00 was imposed upon the corporate defendant.

Detroit Vital Foods, Inc., is a Michigan corporation with headquarters in Detroit. The defendants Kordel and Feldten were its president and vice president, respectively. During 1959, 1960, and 1961, Kordel traveled acros the country delivering a series of lectures in different cities. Advertisement of the lectures preceded his appearance and the public was invited to attend. The meetings were held in public halls or auditoriums leased for the occasion by the defendants. Sales booths were established in or near the lecture halls where the audience could purchase the company's products Aminex, Frutex, Nutri-Time, Korleen, and other products not here in question, usually at special introductory prices. The company's products were sold not only at the lectures but were generally available in health food stores. Each package had a label attached which described the contents and gave directions for use.

Kordel was the author of numerous books and leaflets, such as "Eat and Grow Younger", "How to Make People Like You", "Health Through Nutrition", and "Is This a New Way to Strengthen Your Heart?"

The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best source of these foods and food elements, it was said, were the products offered for sale by the defendants. Leaflets distributed to the lecture audiences were to the effect that the statements made were the personal opinion of the speaker and author and that a physician should be consulted in regard to specific diseases.

Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit.

Kordel in his lectures and published material advertised some products by name. In other instances, he merely related certain chemicals or food elements to the improvement of various physical ailments and recommended the company's products as the best source. For example:

> A combination of chlorine, methionine, and inositol —exactly the ingredients of Korleen—is a successful treatment for cirrhosis of the liver.
>
> Varicose veins existing for twenty-five years were cured in three months with the intake of three Korleen tablets per day.
>
> People may "protect" their bodies from headaches, colds, stiff ankles, poor circulation, gas, constipation, and poor digestion by partaking of a concentrated source of seventy-two different vitamins,

> minerals, and nutrients—coincidentally, the product which contains all those ingredients is Nutri-Time.
>
> Vitamin C is a preventive and cure for bleeding gums, sore throat, earache, swollen neck glands, pneumonia, and acute rheumatism—the best source of Vitamin C is Frutex.
>
> Protein helps form antibodies to fight infection and is the first line of defense; it is most efficiently assimilated within the body when introduced in the form of a concentrated protein tablet—the recommended source is Super Protein Aminex which has a high concentrate of protein and all animal acids in the proper balance.

Kordel occasionally stated that his remarks had no relation to drugs, that he spoke only of natural nutrients used as food supplements.

Several grounds of assigned error were argued in briefs but we consider it necessary to discuss only one. We hold that the judgments must be reversed because defendants were compelled to give testimony against themselves in violation of the Fifth Amendment to the United States Constitution.

While defendants were under investigation for possible criminal violation of the Food, Drug and Cosmetic Act, the Government instituted a civil action against Detroit Vital Foods, Inc., to condemn certain quantities of their products Korleen and Frutex, asserting that these articles were misbranded. In the civil action the defendants were served with extensive written interrogatories seeking comprehensive and detailed information about the corporate defendant and the activities of the individual defendants in connection with the company's business. Before these

interrogatories were answered defendants were notified that the Government contemplated taking criminal action against them because of their activities in connection with Korleen and Frutex.

The defendants filed objections to being required to answer the interrogatories and moved to stay the civil proceedings pending outcome of the contemplated criminal action. The objections and motion were denied by the Honorable Theodore Levin, United States District Judge for the Eastern District of Michigan, who reasoned that the defendants would not necessarily be prejudiced since there was no certainty when, or if, a criminal action would be brought. The defendants then filed answers to the interrogatories pursuant to Judge Levin's order. Much of the information supplied by the defendants in answer to the interrogatories was necessary to the Government's case in the criminal prosecution.

Prior to the trial of this action, the defendants moved to quash the indictment and to suppress all evidence and leads obtained by the Government in the civil action. The trial judge, Honorable Ralph M. Freeman, granted a hearing on the motions and thereafter denied them. It was developed at the hearing that the civil case and the investigation of the criminal case went forward on a common front. Information obtained in the civil case was transmitted to those in charge of the criminal investigation, and recommendation for criminal prosecution was not made until after Judge Levin had ordered the interrogatories to be answered in the civil case. The interrogatories were prepared by Mr. Randolph of the Food and Drug Administration in Washington, who made the initial decision to recommend criminal action against the defendants. The answers to the interrogatories were sent

to Mr. Randolph and the indictment was prepared in Randolph's office.

In no sense was the action of the defendants in answering the interrogatories voluntary. When ordered to do so after their objections had been overruled, they had three possible courses available to them. They could still have refused to answer. This almost certainly would have resulted in the forfeiture of their property which had been seized by the Government. They could have given false answers to the interrogatories. This would have subjected them to possible prosecution for perjury. Their third course was to supply the required information, thereby possibly incriminating themselves in the contemplated criminal action. In choosing the third course defendants supplied the Government with evidence and leads helpful in securing their indictment and subsequent conviction. Their choice was a hard one and the specific question is whether they could be required to make a choice. We think not. A person may not be required to supply information which might possibly incriminate him upon penalty of suffering a forfeiture of his property. This is a "compelling" which is prohibited by the Fifth Amendment. The early case of *Boyd* v. *United States*, 116 U. S. 616 (1886), is in point.

Boyd was a civil action to seize goods allegedly imported without the payment of customs duties. The Government attempted to subpoena invoices which were in the possession of the defendants. The Supreme Court, regarding the action as having a "quasi-criminal" nature, denied the Government's right to subpoena the invoices, holding that

> "[A] compulsory production of the private books and papers of the owners of goods sought to be for-

> feited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." 116 U.S. at 634, 635

The same principle was involved in *Garrity* v. *New Jersey,* 385 U.S. 493 (1967). There, certain policemen had been convicted of a conspiracy to obstruct the administration of the New Jersey traffic laws. The policemen appealed on the ground that statements obtained in violation of their privilege against self-incrimination were used as evidence to convict them. The incriminatory statements were obtained during an investigation by the New Jersey Attorney General into the fixing of traffic tickets. The policemen were questioned during this investigation, after being informed of their privilege against self-incrimination but were warned that if they refused to answer they could be removed from their jobs.

They answered the questions, and their answers were later used to convict them. The Supreme Court reversed the convictions, saying:

> "The choice given the petitioners was either to feit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice, like interrogation practices we revewed in *Miranda* v. *Arizona,* 384 U.S. 436, 464-465, is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think

> the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." 385 U.S. at 497, 498.

It has consistently been held that a penalty may not be placed upon one for exercising his privilege against self-incrimination. *Spevack* v. *Klein,* 385 U.S. 511 (1967), and *Slochower* v. *Board of Education,* 350 U.S. 551 (1956). Also see *United States* v. *Parrott,* 248 F. Supp. 196 (D.D.C. 1965); *United States* v. *Thayer,* 214 F. Supp. 929 (DC Colo. 1963); *Lord* v. *Kelley,* 223 F. Supp. 684 (DC Mass. 1963); *United States* v. *Lipshitz,* 132 F. Supp. 519 (E.D.N.Y. 1955); and *United States* v. *Guerrina,* 112 F. Supp. 126 (E.D. Pa. 1953).

At the hearing held by Judge Freeman evidence was heard on the issue of the Government's good faith in bringing the civil action. Judge Freeman concluded that the civil action was brought in good faith and was not a subterfuge to obtain evidence for a criminal prosecution. He held therefore that the evidence was not tainted, relying on *Abel* v. *United States,* 362 U.S. 217 (1960).

Abel is not controlling here. That case involved a search and seizure issue; compulsory self-incrimination was not involved. The civil and criminal charges in *Abel* were only remotely related and it was by chance that evidence helpful in a criminal prosecution was obtained in the search. Moreover, the limits of the search were much more restricted than is the scope of permissible inquiry in civil interrogatories. In *Abel* it was conceded that the questioned evidence was obtained during a legal search of the defendant's hotel room after he was arrested on a deportation

charge. It was claimed by the defendant that the Government was primarily interested in prosecuting him for espionage and that the search of his room was a ruse by Government agents to obtain evidence in the espionage case. The good faith of the Government agents was the issue in question. The question here is whether defendants were coerced to testify against themselves. If they were coerced within the meaning of the Fifth Amendment, the violation cannot be condoned merely because the Government agents acted in good faith. It is little comfort to the aggrieved party that those who deprive him of a constitutional right are men of good intentions.

The Government contends that the Fourth and Fifth Amendments do not prohibit the use of subpoenaed corporate books and records in a criminal prosecution against the corporation and its officers, citing *Essgee Co.* v. *United States,* 262 U.S. 151 (1923), and *Wilson* v. *United States,* 221 U.S. 361 (1911). These and other subsequent cases do so hold, but these interrogatories went far beyond a subpoena for corporate books and records. Feldten signed the answers to the interrogatories in his capacity as vice president but Kordel, as president, was under the same compulsion as Felton to furnish the answers. Although the privilege against self-incrimination is personal, *White* v. *United States,* 322 U.S. 694 (1944), the interrogatories were for the most part requests for admissions by and information about the individual defendants, Kordel and Feldten. Many of the interrogatories required answers revealing Kordel's activities, speeches, and representations then under scrutiny in the contemplated criminal action. An officer in a corporation does not lose his personal privilege against self-incrimination under the Fifth Amendment by reason of his corporate position.

In *Wilson,* which is a forerunner of those cases holding that corporation officers may not invoke their Fifth Amendment rights to prevent the production of corporate records, Mr. Justice Hughes drew the distinction in these words:

> "They may decline to utter upon the witness stand a single self-incriminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers." 221 U.S. at 385.

It is said in the Government's brief that all of the evidence used in the criminal case was obtained by independent investigation and that evidence obtained through the interrogatories was not used in the criminal action. We find no tangible support in the record for this statement. It is admitted by Mr. Fowler, the Government agent on whose testimony the indictment was returned — he was the only witness who appeared before the grand jury—that he used the answers to the interrogatories in preparing his testimony before that body. There is no showing by the Government that any attempt was made at any stage of the proceedings to separate the two cases. There is no testimony or avowal by those who investigated and prosecuted the criminal case that they did not use evidence and leads obtained through answers to the interrogatories. We conclude that evidence and leads obtained by reason of the interrogatories were used against the defendants in the criminal case. The motion to suppress all such evidence should have been sustained.

We do not hold that a Government agency may not institute and prosecute civil proceedings on charges that

may also involve a possible criminal violation. We hold merely that the Government may not maneuver an individual into a situation in a civil case where he is faced with a choice that has the effect of compelling him to incriminate himself in a contemplated criminal case. Clearly, this is what occurred in the present case.

Defendants vigorously assert that the indictment should have been quashed for the reason, among others, that Mr. Fowler admited he used the answers to the interrogatories in organizing his testir ony before the grand jury. In light of *United States* v. *Blue,* 384 U.S. 251 (1966), we hold that defendants' argument on this point is not well taken.

We observe for the benefit of the trial judge and counsel in the event of another trial that we find no merit in the other grounds assigned as error by the defendants.

Reversed and remanded for proceedings consistent with this opinion.

Order Modifying Opinion of United States Court of Appeals for the Sixth Circuit

No. 17,639

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

[SAME TITLE]

Before: O'Sullivan and Combs, Circuit Judges, and Cecil, Senior Circuit Judge.

The Government's petition for rehearing is granted. The opinion heretofore filed, on July 26, 1968, is modified on its face. The judgment is affirmed as to the corporate defendant, Detroit Vital Foods, Inc., and reversed as to the individual defendants, Lelord Kordel and Alfred Feldten.

Entered by order of the Court:

CARL W. REUSS
Clerk

Filed Feb 20.1969

CARL W. REUSS, Clerk

Opinion by United States Court of Appeals for the Sixth Circuit, as Modified

Decided February 20, 1969

Before: O'SULLIVAN and COMBS, Circuit Judges, and CECIL, Senior Circuit Judge.

COMBS, Circuit Judge. The defendants were found guilty by a jury on five counts of an indictment charging them with introduction into interstate commerce of misbranded drugs and with causing a drug to be misbranded after it had been shipped in interstate commerce. 21 U.S.C. §331(a) and (k). The defendant Kordel was sentenced to two years imprisonment and to a fine of $10,000.00. The defendant Feldten was sentenced to one year imprisonment, suspended to thirty days with three years probation, and to a fine of $2,000.00. A total fine of $10,000.00 was imposed upon the corporate defendant.

Detroit Vital Foods, Inc., is a Michigan corporation with headquarters in Detroit. The defendants Kordel and Feldten were its president and vice president, respectively. During 1959, 1960, and 1961, Kordel traveled acros the country delivering a series of lectures in different cities. Advertisement of the lectures preceded his appearance and the public was invited to attend. The meetings were held in public halls or auditoriums leased for the occasion by the defendants. Sales booths were established in or near the lecture halls where the audience could purchase the company's products Aminex, Frutex, Nutri-Time, Korleen, and other products not here in question, usually at special introductory prices. The company's products were sold not only at the lectures but were generally available in health

food stores. Each package had a label attached which described the contents and gave directions for use.

Kordel was the author of numerous books and leaflets, such as "Eat and Grow Younger", "How to Make People Like You", "Health Through Nutrition", and "Is This a New Way to Strengthen Your Heart?"

The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best source of these foods and food elements, it was said, were the products offered for sale by the defendants. Leaflets distributed to the lecture audiences were to the effect that the statements made were the personal opinion of the speaker and author and that a physician should be consulted in regard to specific diseases.

Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit.

Kordel in his lectures and published material advertised some products by name. In other instances, he merely related certain chemicals or food elements to the improvement of various physical ailments and recommended the company's products as the best source. For example:

> A combination of chlorine, methionine, and inositol —exactly the ingredients of Korleen—is a successful treatment for cirrhosis of the liver.
>
> Varicose veins existing for twenty-five years were cured in three months with the intake of three Korleen tablets per day.
>
> People may "protect" their bodies from headaches, colds, stiff ankles, poor circulation, gas, con-

> stipation, and poor digestion by partaking of a concentrated source of seventy-two different vitamins, minerals, and nutrients—coincidentally, the product which contains all those ingredients is Nutri-Time.
>
> Vitamin C is a preventive and cure for bleeding gums, sore throat, earache, swollen neck glands, pneumonia, and acute rheumatism—the best source of Vitamin C is Frutex.
>
> Protein helps form antibodies to fight infection and is the first line of defense; it is most efficiently assimilated within the body when introduced in the form of a concentrated protein tablet—the recommended source is Super Protein Aminex which has a high concentrate of protein and all aminal acids in the proper balance.

Kordel occasionally stated that his remarks had no relation to drugs, that he spoke only of natural nutrients used as food supplements.

Several grounds of assigned error were argued in briefs but we consider it necessary to discuss only one. We hold that the judgments must be reversed because defendants were compelled to give testimony against themselves in violation of the Fifth Amendment to the United States Constitution.

While defendants were under investigation for possible criminal violation of the Food, Drug and Cosmetic Act, the Government instituted a civil action against Detroit Vital Foods, Inc., to condemn certain quantities of their products Korleen and Frutex, asserting that these articles were misbranded. In the civil action the defendants were served with extensive written interrogatories seeking com-

prehensive and detailed information about the corporate defendant and the activities of the individual defendants in connection with the company's business. Before these interrogatories were answered defendants were notified that the Government contemplated taking criminal action against them because of their activities in connection with Korleen and Frutex.

The defendants filed objections to being required to answer the interrogatories and moved to stay the civil proceedings pending outcome of the contemplated criminal action. The objections and motion were denied by the Honorable Theodore Levin, United States District Judge for the Eastern District of Michigan, who reasoned that the defendants would not necessarily be prejudiced since there was no certainty when, or if, a criminal action would be brought. The defendants then filed answers to the interrogatories pursuant to Judge Levin's order. Much of the information supplied by the defendants in answer to the interrogatories was necessary to the Government's case in the criminal prosecution.

Prior to the trial of this action, the defendants moved to quash the indictment and to suppress all evidence and leads obtained by the Government in the civil action. The trial judge, Honorable Ralph M. Freeman, granted a hearing on the motions and thereafter denied them. It was developed at the hearing that the civil case and the investigation of the criminal case went forward on a common front. Information obtained in the civil case was transmitted to those in charge of the criminal investigation, and recommendation for criminal prosecution was not made until after Judge Levin had ordered the interrogatories to be answered in the civil case. The in-

terrogatories were prepared by Mr. Randolph of the Food and Drug Administration in Washington, who made the initial decision to recommend criminal action against the defendants. The answers to the interrogatories were sent to Mr. Randolph and the indictment was prepared in Randolph's office.

In no sense was the action of the defendants in answering the interrogatories voluntary. When ordered to do so after their objections had been overruled, they had three possible courses available to them. They could still have refused to answer. This almost certainly would have resulted in the forfeiture of their property which had been seized by the Government. They could have given false answers to the interrogatories. This would have subjected them to possible prosecution for perjury. Their third course was to supply the required information, thereby possibly incriminating themselves in the contemplated criminal action. In choosing the third course defendants supplied the Government with evidence and leads helpful in securing their indictment and subsequent conviction. Their choice was a hard one and the specific question is whether they could be required to make a choice. We think not. A person may not be required to supply information which might possibly incriminate him upon penalty of suffering a forfeiture of his property. This is a "compelling" which is prohibited by the Fifth Amendment. The early case of *Boyd* v. *United States*, 116 U. S. 616 (1886), is in point.

Boyd was a civil action to seize goods allegedly imported without the payment of customs duties. The Government attempted to subpoena invoices which were in the possession of the defendants. The Supreme Court, regarding the

action as having a "quasi-criminal" nature, denied the Government's right to subpoena the invoices, holding that

> "[A] compulsory production of the private books and papers of the owners of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." 116 U.S. at 634, 635

The same principle was involved in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). There, certain policemen had been convicted of a conspiracy to obstruct the administration of the New Jersey traffic laws. The policemen appealed on the ground that statements obtained in violation of their privilege against self-incrimination were used as evidence to convict them. The incriminatory statements were obtained during an investigation by the New Jersey Attorney General into the fixing of traffic tickets. The policemen were questioned during this investigation, after being informed of their privilege against self-incrimination but were warned that if they refused to answer they could be removed from their jobs.

They answered the questions, and their answers were later used to convict them. The Supreme Court reversed the convictions and held that the use of the statements violated the petitioners' privilege against self-incrimination. The Court said:

> "The choice given the petitioners was either to forfeit their jobs or to incriminate themselves. The op-

> tion to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice, like interrogation practices we revewed in *Miranda* v. *Arizona,* 384 U.S. 436, 464-465, is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.", 385 U.S. at 497, 498.

The Supreme Court has consistently held that a penalty may not be placed upon one for exercising his privilege against self-incrimination. *Spevack* v. *Klein,* 385 U. S. 511 (1967), and *Slochower* v. *Board of Education,* 350 U. S. 551 (1956). Also see *United States* v. *Parrott,* 248 F. Supp. 196 (D. D. C. 1965); *United States* v. *Thayer,* 214 F. Supp. 929 (DC Colo. 1963); *Lord* v. *Kelley,* 223 F. Supp. 684 (DC Mass. 1963); *United States* v. *Lipshitz,* 132 F. Supp. 519 (E. D. N. Y. 1955); and *United States* v. *Guerrina,* 112 F. Supp. 126 (E. D. Pa. 1953).

At the hearing held by Judge Freeman on the motion to quash the indictment and to suppress evidence obtained through the interrogatories, evidence was heard on the issue of the Government's good faith in bringing the civil action. Judge Freeman concluded that the civil action was brought in good faith and was not a subterfuge to obtain evidence for a criminal prosecution. He held therefore that the evidence was not tainted, relying on *Abel* v. *United States,* 362 U. S. 217 (1960).

Abel is not controlling here. That case involved a search and seizure issue; compulsory self-incrimination was not

involved. The civil and criminal charges in *Abel* were only remotely related and it was by chance that evidence helpful in a criminal prosecution was obtained in the search. Moreover, the limits of the search were much more restricted than is the scope of permissible inquiry in civil interrogatories. In *Abel* it was conceded that the questioned evidence was obtained during a legal search of the defendant's hotel room after he was arrested on a deportation charge. It was claimed by the defendant that the Government was primarily interested in prosecuting him for espionage and that the search of his room was a ruse by Government agents to obtain evidence in the espionage case. The good faith of the Government agents was the issue in question. The question here is whether defendants were coerced to testify against themselves. If they were coerced within the meaning of the Fifth Amendment, the violation cannot be condoned merely because the Government agents acted in good faith. It is little comfort to the aggrieved party that those who deprive him of a constitutional right are men of good intentions.

The Government contends that the Fourth and Fifth Amendments do not prohibit the use of subpoenaed corporate books and records in a criminal prosecution against the corporation and its officers, citing *Essgee Co.* v. *United States*, 262 U.S. 151 (1923), and *Wilson* v. *United States*, 221 U.S. 361 (1911). These and other subsequent cases do so hold, but these interrogatories went far beyond a subpoena for corporate books and records. Kordel was president of the company and Feldten was vice president. Feldten signed the answers to the interrogatories in his capacity as vice president but Kordel, as president, was under the same compulsion as Feldten to furnish the answers. Al

though the privilege against self-incrimination is personal, *White* v. *United States*, 322 U.S. 694 (1944), the interrogatories were for the post part requests for admissions by and information about the individual defendants, Kordel and Feldten. Many of the interrogatories required answers revealing Kordel's activities, speeches, and representations then under scrutiny in the contemplated criminal action. An officer in a corporation does not lose his personal privilege against self-incrimination under the Fifth Amendment by reason of his corporate position.

In *Wilson*, which is a forerunner of those cases holding that corporation officers may not invoke their Fifth Amendment rights to prevent the production of corporate records, Mr. Justice Hughes drew the distinction in these words:

> "They may decline to utter upon the witness stand a single self-incriminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers." 221 U.S. at 385.

It is said in the Government's brief that all of the evidence used in the criminal case was obtained by independent investigation and that evidence obtained through the interrogatories was not used in the criminal action. We find no tangible support in the record for this statement. It is admitted by Mr. Fowler, the Government agent on whose testimony the indictment was returned—he was the only witness who appeared before the grand jury, that he used the answers to the interrogatories in preparing his testimony before the grand jury. There is no showing by the Government that any attempt was made at any

stage of the proceedings to separate the two cases. There is no testimony or avowal by those who investigated and prosecuted the criminal case that they failed to use evidence and leads obtained through answers to the interrogatories. It is admitted by Government witnesses that in the enforcement of the Federal Food, Drug and Cosmetic Act it is not unusual for the Government first to commence a civil action and then use information obtained in that case in parallel criminal proceedings. Information obtained from whatever source is placed in one general file. We note, too, that the interrogatories submitted by the Government were broader than would ordinarily be needed in a civil case. Some of the interrogatories were directed specifically toward the activities of Leland Kordel, president of Detroit Vital Food, Inc., and the principal defendant in this case. We conclude from this record that evidence and leads obtained by reason of the interrogatories were used against the defendants in the criminal case.

It is pointed out by the Government that the Fifth Amendment privilege against self-incrimination is available only to natural persons and not to a corporation. We agree that this defense is not available to the corporate defendant, Detroit Vital Foods, Inc. *Campbell Printing Co.* v. *Reid,* 392 U. S. 286 (1968).

It is also argued by the Government that the Fifth Amendment privilege is not available to the individual defendant Kordel because he made no claim to the seized property and supplied no answers to the interrogatories. With this argument we do not agree. It is clear from the record that Detroit Vital Foods, Inc., was merely the corporate device through which Kordel sold his products.

Opinion by United States Court of Appeals for the Sixth Circuit, as Modified

The Government naturally wanted to cut through the facade and get to Kordel who was the president and dominant personality in the corporation. Although the extent of Kordel's ownership in the corporation is not disclosed by the testimony before us, he evidently was a major stockholder. He therefore had a financial interest in the seized property and certainly, as president of the company, he participated in the decision to answer the interrogatories. Aside from this, if it should be conceded that Kordel was under no coercion to answer the interrogatories, we are of the opinion that Feldten's admissions were not admissible against him under the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968). We conclude therefore that evidence and leads obtained by reason of the interrogatories should have been suppressed against the individual defendants in the criminal case.

We do not hold that a government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal proceeding against the same persons. We hold merely that the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property.

The judgment is reversed as to the individual defendants, Kordel and Feldten, and the case is remanded for proceedings consistent with this opinion. The judgment is affirmed as to the corporate defendant, Detroit Vital Foods, Inc.

APPENDIX B

Statutes

Fourth Amendment to the Constitution of the United States states:

AMENDMENT 4

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States states:

AMENDMENT 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

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350-922—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1285

DETROIT VITAL FOODS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 29a–39a) is reported at 407 F. 2d 570.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1968, and was modified on a petition for rehearing on February 20, 1969. On March 20, 1969, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to April 21, 1969, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for violation of the food and drug laws, petitioner's rights under the Fourth Amendment were violated by the fact that the government, in a prior civil proceeding to condemn the drugs owned by the petitioner corporation, had directed interrogatories to the corporation pursuant to Rule 33, F.R. Civ. P., with respect to the activities of the corporation and certain of its officers in connection with the drugs.

2. Whether the indictment should have been quashed because it was based in part on information obtained through the use of the interrogatories.

3. Whether tape recordings of public lectures given by an officer of petitioner corporation were properly admitted into evidence.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner and two of its officers (Kordel and Feldten) were convicted on five counts of an indictment charging them with introducing into interstate commerce certain misbranded drugs (Frutex wafers, Lecigan granules, Aminex and Nutri-Time tablets) and with performing acts which resulted in the misbranding of the drug Korleen while it was being held for sale after shipment in interstate commerce (21 U.S.C. 331 (a), (k)). Petitioner was sentenced to pay a fine of

$1000 on each count, plus the costs of prosecution pursuant to 28 U.S.C. 1916 (707a).[1]

Petitioner is a Michigan corporation with its headquarters in Detroit. Kordel was its president and Feldten its treasurer (250b–252b). Kordel was the author of numerous books and leaflets promoting the products of petitioner. As the court of appeals found, the evidence showed that during the years 1959–1961 Kordel traveled across the country delivering lectures in various cities which were advertised and open to the public. The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best source of these foods and food elements, it was said, were the products of petitioner offered for sale by the defendants. The company's products were sold at booths established in or near the lecture halls and were also available in health food stores generally. Feldten made no speeches but acted as Kordel's assistant (Pet. 29a–30a). The essence of the criminal charges against the defendants was that, as to some of the products, certain books and leaflets written by Kordel constituted part of the labeling and contained

[1] Page references followed by "a" are to defendants' appendix in the court of appeals; those followed by "b" are to the government's appendix in that court. Both appendices, which contain substantial excerpts from the proceedings in the district court, are on file with the Clerk of this Court in connection with the government's petition for a writ of certiorari in No. 1291, this Term. See *infra*, p. 7.

false and misleading statements. In addition, the indictment alleged, as to all counts on which the defendants were convicted,[2] that the products (claimed by defendants to be merely food supplements) were in fact drugs intended by defendants to be used for the treatment of various diseases and conditions (see Pet. 30a–31a) and that the labeling for them was deficient under 21 U.S.C. 352(f) in that it failed to set forth adequate directions for use (*e.g.*, the dosage, frequency and duration of administration of each drug). The government proved Kordel's oral representations about the drugs by introducing tape recordings of his public lectures, each of which was attended by at least one agent of the Food and Drug Administration.

The indictment in this case was returned in July 1963. On June 9, 1960, the government had filed a libel under 21 U.S.C. 334 seeking to condemn quantities of the products Korleen tablets and Frutex, on the ground that they had been misbranded while held for sale after shipment in interstate commerce. Petitioner filed a claim and answer denying the material allegations of the libel. During the course of the civil suit, which terminated favorably to the government (see *United States* v. *Detroit Vital Foods, Inc.*, 330 F. 2d 78 (C.A. 6), certiorari denied, 379 U.S. 832), the government served interrogatories upon the claimant pursuant to Rule 33, F.R. Civ. P. The interrogatories were filed on January 9, 1961, and sought detailed in-

[2] Defendants were convicted on counts 4, 8, 9, 10, and 11 of the indictment, which are set forth at pages 13a–17a and 26a–39a of defendants' appendix.

formation about petitioner and about Kordel's oral representations concerning the products Frutex and Korleen tablets made during the lecture series at Detroit between March 29, and April 8, 1960.[3] In April 1961 petitioner moved to stay the libel action on the ground that criminal prosecution was being considered by the government. The motion recited that in late January 1961, shortly after service of the interrogatories by the government, the company had received a notice under 21 U.S.C. 335, indicating that criminal prosecution of the corporation and of Kordel and Feldten was contemplated, in part for the same conduct which was the subject of the libel. The motion asked that the claimant's time to respond to the interrogatories be extended until after final disposition of the criminal case pursuant to the court's discretionary power, since answering the interrogatories would disclose the basis of the claimant's defense in the criminal case. In June 1961, the district court denied the motion for a stay, on the ground that there was no certainty when or whether a criminal prosecution would be brought, and that the corporation was not prejudiced by being required to answer the interrogatories, since the government could in any event obtain information pertinent to a criminal case from the trial of the libel itself.[4] Answers to the interrogatories were

[3] Count 4 of the instant indictment was based on this lecture-promotion. The other counts on which petitioner was convicted were based on lecture-promotions of March 7–17, 1960, given at New York, and April 4–14, 1961, given at Detroit.

[4] We have lodged with the Clerk of this Court, in connection with our petition for certiorari in No. 1291, this Term, a copy of the district court's decision denying claimant's motion to stay the libel proceeding.

subsequently filed by Feldten, on behalf of petitioner.

Following receipt of petitioner's answers to the interrogatories, the matter was referred to the Attorney General with a recommendation for prosecution on June 13, 1962. An indictment was returned on August 5, 1963. On March 22, 1965, defendants moved to suppress "any evidence or leads obtained therefrom by the Federal Government in compulsory discovery proceedings instituted by the Government" in the libel action (55a). They contended that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority, and is violative of civilized standards of procedures in the administration of criminal justice" (*ibid.*). In the alternative the motion requested a hearing to determine the government's good faith and motive in commencing the civil action and serving the interrogatories. The district court granted the request for a hearing. After a three-day hearing (see 1b–66b), the court found (in an opinion set forth at Pet. App. 8a–11a) that at the time the civil case was filed, the attorney for the Food and Drug Administration had evidence to establish all of the elements of the criminal offenses (see testimony of George Fowler, Deputy Director of the Detroit District of the F.D.A., at 6b–7b, 14b), and that the purpose of the interrogatories was to narrow the issues and to lay a foundation for a motion for summary judgment. The court determined that the government did not act in bad faith in starting the civil suit or in filing the interrogatories,

and that there was then no certainty that a criminal prosecution would be brought. The motion to suppress was, therefore, denied, on the authority of *Abel* v. *United States,* 362 U.S. 217, 225–230.

On July 26, 1968, the court of appeals reversed the convictions of all defendants on the ground that they had been denied the protection afforded by the Fifth Amendment in connection with the use of the interrogatories (Pet. 18a–27a).[5] The government filed a petition for rehearing which was granted. On February 20, 1969, the court of appeals, noting that the Fifth Amendment privilege against self-incrimination was not available to the corporation, modified its written opinion so as to affirm the conviction of petitioner, but adhered to its judgment reversing the convictions of Kordel and Feldten (Pet. 28a–39a). The government has filed a petition for a writ of certiorari from the judgment reversing the convictions of the individual defendants. No. 1291, this Term, presently pending.

ARGUMENT

1. Petitioner's contention that its Fourth Amendment rights were infringed by the government's use of the interrogatories in the libel suit would seem to hinge on the question whether, assuming service of the interrogatories constituted a search and seizure (see *Boyd* v. *United States,* 116 U.S. 616), the government's use of the interrogatories was "reasonable"

[5] The court stated in that opinion that it found "no merit in the other grounds assigned as error by the defendants" (Pet. 27a), which include the matters relied on by petitioner in questions 2–4 of the petition, discussed in parts 2 and 3 of the Argument herein.

within the meaning of the Amendment. This question is substantially different from the issue presented in the government's petition for certiorari in No. 1291 concerning the court of appeals' holding that the Fifth Amendment privilege against self-incrimination of the individual defendants in this case was violated by the government's service of the interrogatories on the corporation under a theory that this "compelled" them to furnish incriminating information. If in fact there was compulsion on the individual defendants to answer the interrogatories (which we dispute), then the government's good faith or reasonableness in serving the interrogatories would be irrelevant, as the court below held. Since, therefore, the issue which petitioner raises is discrete from that raised in the government's petition, the granting of the government's petition would not necessitate consideration of the question raised here.

On its own merits, there is no reason to review this case on behalf of petitioner corporation. Petitioner's contention that the use of the interrogatories in this case was unreasonable ignores the findings of the district judge on the motion to suppress (Pet. 8a–11a), which have ample support in the record (see 1b–66b). It simply is not the fact, as petitioner would have it, that the civil proceeding was instituted, or the interrogatories served, in bad faith as a means of obtaining information for use in the criminal prosecution. On the contrary, the record shows, as the court found, that the purpose of the interrogatories was the normal one of attempting to expedite the civil action by preparing a foundation for a motion for summary

judgment. At the time the civil action was commenced and the interrogatories submitted, there was no certainty that a criminal action would even be begun.

Moreover, it is not improper for a government agency to proceed simultaneously on criminal and civil fronts against a corporation or individuals. See *United States* v. *Blue,* 384 U.S. 251; *Abel* v. *United States,* 362 U.S. 217; *United States* v. *Light,* 394 F. 2d 908 (C.A. 2); *United States* v. *Parrott,* S.D.N.Y., No. 66 Cr. 243, decided February 14, 1969. Government agencies in many fields, including food and drug, securities, antitrust and tax, among others, are vested with the responsibility of administering federal statutes which provide both civil and criminal remedies against offending corporations and/or persons. In administering the food and drug laws, there is an obvious need for the government to act quickly in bringing civil condemnation proceedings to protect the public by removing misbranded or adulterated drugs from circulation in the common situation in which further investigation is appropriate before it is decided whether or not to institute a criminal prosecution. That is what was done here. The courts below properly determined that since the action of the government in bringing the civil suit was reasonable, and since its use of the interrogatories was designed to advance the purpose of the civil litigation and was authorized by the Federal Rules of Civil Procedure for that purpose,[6] no rights

[6] Rules 30(b) and 33, F.R. Civ. P., provide the means by which a party may be excused, in the civil proceeding itself, from answering improper or overbroad interrogatories. One who fails to pursue this remedy and chooses, instead, to an-

of petitioner under the Fourth Amendment were transgressed. See *Abel* v. *United States, supra; United States* v. *Light, supra; United States* v. *Parrott, supra.*

2. Petitioner's argument that the indictment should have been quashed because it was founded on information derived from the allegedly unlawful use of the interrogatories is baseless. As we have pointed out above, the serving of the interrogatories was not unlawful. In any event, use of the information obtained thereby did not invalidate the indictment. *United States* v. *Blue,* 384 U.S. 251.[7]

Petitioner also contends (Pet. 15–16) that there was no competent witness before the grand jury because the sole person who appeared before that body was the government agent (Fowler) who was in charge of the agency investigation in connection with the present case. As the trial judge correctly ruled (Pet. 16a), however, the agent-in-charge was a competent witness and was not, as petitioner asserts (Pet. 16), a "prose-

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swer the interrogatories should not be heard to claim, in a subsequent proceeding, that the interrogatories violated his Fourth Amendment rights.

[7] While perhaps legally irrelevant, we note that petitioners' assertion that agent Fowler's "testimony [before the grand jury] consisted merely of the answers to the interrogatories" (Pet. 16) is inaccurate. Agent Fowler testified that he did not read from the case file during the course of his testimony, but reviewed the file in preparing for his testimony (43b). The agency file, which did not even contain all of petitioner's answers to the interrogatories (45b–47b), consisted of data which had been gathered by the F.D.A. in connection with both the civil and criminal proceeding (44b). Much of that information had been obtained long prior to the service of, and answers to, the interrogatories here complained of (6b–7b, 14b).

cutor". The circumstance that agent Fowler supplied the grand jury with a proposed indictment in this complicated case (46b, 49b–50b) does not impair the validity of the indictment or the agent's status as a witness.

3. At trial, defendants objected to the admissibility of recordings and transcripts of Kordel's lectures given at Detroit in 1960 and 1961, on which counts 4 and 11 of the instant indictment were based. The ground of the objections was that the tapes were obtained in violation of the Fourth Amendment by the illegal use of electronic equipment. The district judge at trial denied the motion to suppress the tapes and repeated his ruling in denying a post-verdict motion for acquittal or a new trial (Pet. 16a–17a).

The first two lectures of the 1960 series (March 29–April 8) were given in the Masonic Temple; the remainder took place at the Fort Wayne Hotel. The recording of the 1960 Masonic Temple lecture was accomplished by Food and Drug Inspectors Covert and Beebe who, prior to the lecture, obtained the permission of the building manager to tape it with a recorder already installed in the manager's office, which was connected to the speaker's microphone in the lecture hall (125b–127b, 225a–230a). The remaining lectures were transcribed after the same two agents, prior to the giving of the third lecture, obtained the permission of the Fort Wayne Hotel manager to install recording equipment. They placed a recorder in a room of the hotel and ran a wire and microphone across the roof of the lecture hall and

down an air vent into the ceiling of the lecture hall, which was leased to Kordel (142b–144b, 255a–260a).

The lecture at the Temple in 1961 was recorded by means of a Minifon recorder carried into the lecture hall by Food and Drug Inspector Vince (181b–183b). The lectures at the hotel were recorded in the same manner as the 1960 lectures held therein (180b–181b, 265a–270a).

Petitioner's contention that the agents' action in recording the lectures violated its Fourth Amendment rights is without substance. The lectures given by Kordel were on all occasions open to the public. Wholly aside from any problems of standing (see *Alderman* v. *United States,* No. 133, O.T., 1967, decided March 10, 1969), it is clear that there was no intent on the part of the speaker or of petitioner corporation that Kordel's words be kept private. Thus, as the district judge held (Pet. 17a), the essential predicate for a Fourth Amendment violation was absent. See *Lopez* v. *United States,* 373 U.S. 427; *On Lee* v. *United States,* 343 U.S. 747; *Hoffa* v. *United States,* 385 U.S. 293.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1285

DETROIT VITAL FOODS, INC.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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OCTOBER TERM, 1968

No. 1285

DETROIT VITAL FOODS, INC.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner presents its petition for a rehearing of this Court's order dated June 2, 1969, denying its petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, and, in support thereof, respectfully shows:

1. This petition for rehearing is based upon substantial grounds available to petitioner, although not previously presented, and on intervening circumstances of substantial effect pursuant to Rule 58, subdivision (2) of the Rules of this Court.

2. The opinion and judgment of the Court of Appeals as to which certiorari was sought was entered on February 20, 1969, and is reported at 407 F. 2d 570 (C. A. 6, 1969). The opinion specifically stated that "several grounds of assigned error were argued in briefs, but we

consider it necessary to discuss only one" (App. A, 31 A).*. This opinion of the Court of Appeals superseded and expunged a first opinion of the Court of Appeals, entered on July 26, 1968, which was not officially reported since it does not constitute the court's disposition of the appeal (App. A, 18a). In the first opinion the Court of Appeals made the following statements:

> "Several grounds of assigned error were argued in briefs, but we consider it necessary to discuss only one . . . We observe for the benefit of the Trial Judge and counsel in the event of another trial that we find no merit in the other grounds assigned as error by the defendants" (App. A, 20a, 27a).

Significantly, the first opinion reversed petitioner's conviction, while the second opinion, which did not consider the other grounds of assigned error, affirmed the conviction.

3. Simultaneously with the filing of the petition herein, the government filed a petition for a writ of certiorari in Docket No. 1291 to review the judgment of the Court of Appeals dated February 20, 1969 reversing the judgment of conviction with respect to the individual defendants in the same action. On June 2, 1969, this Court granted the government's petition. The government's petition sought review of only one of the several grounds of assigned error urged on the appeal to, and considered by, the Courtof Appeals, namely, whether the individuals Fifth Amendment privileges were violated by the fact that the government, in a prior civil proceeding, had directed interrogatories and used the answers thereto to

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* References are to the pages of the appendix of the petition for a writ of certiorari filed herein.

indict petitioner herein and the individual defendants (respondents in Docket No. 1291).

4. In the instant petition, petitioner sought to obtain review of the other grounds of assigned error rejected by the Court of Appeals in the first unofficial and subsequently expunged opinion, but not considered in the second and only official opinion. It is thus unclear whether this Court denied the instant petition for certiorari because the second opinion of the Court of Appeals failed to consider the other grounds of assigned erorr, i.e., because the issues were thus not ripe for review by this Court, or whether this Court considered the first unofficial opinion as a dispositive ruling of the said grounds and did not consider that they presented substantial enough questions for review or lacked merit. Petitioner herein is thus in a quandary. If this Court denied the petition for certiorari herein on the basis of the first opinion, neither the petitioner herein nor the individual defendants (respondents in Docket No. 1291) will ever be afforded the opportunity of having these questions considered by this Court. If, on the other hand, this Court denied the instant petition on the basis of the second and only official opinion, this Court, should it reverse the Court of Appeals' ruling with respect to the individual defendants in Docket No. 1291, will be required to remand the case to the Court of Appeals to pass upon the grounds of assigned error urged in the instant petition, but never considered in the said second official opinion.

The orderly and fair administration of criminal justice will be advanced by the granting of the instant petition for rehearing. In Docket No. 1291, dealing with the reversal by the Court of Appeals of the individual defendants' judgment of conviction, the Court of Appeals was not required to and did not pass upon the other

grounds of assigned error. However, these other grounds, which apply equally to the corporate petitioner herein, were presented to this Court by the instant petition for certiorari. Thus, in the event this Court were to reverse the Court of Appeals' ruling in Docket No. 1291, it would be required to remand the case to the Court of Appeals to pass upon the other grounds of assigned error, which in all likelihood would subsequently come back to this Court for final review. If, however, this Court were to grant the instant petition for rehearing, it would have the opportunity, without further delay, to pass upon the questions presented in the instant petition which relate directly to the validity of both the individuals' and the corporate petitioner's convictions.

5. Because of the unusual circumstances involved herein, this Court should either grant the instant petition for rehearing to review the questions presented in the instant petition, or, alternatively, specify whether the denial of the instant petition for certiorari was based upon a failure of the Court of Appeals to pass upon the other grounds of assigned error, and, consequently did not present reviewable questions. Petitioner recognizes that under ordinary circumstances, the affirmance by the Court of Appeals of the corporate petitioner's conviction on any ground might include a *sub silentio* holding that all other grounds of assigned error were considered and rejected. However, this general principle is not applicable as to the Court of Appeals' ruling with respect to the reversal of the individual convictions. Obviously, having found one assigned ground of error sufficient to justify a reversal of the individuals' convictions, the Court of Appeals was not required to pass upon, and in its second and only official opinion, did not pass upon the validity of the other grounds of assigned error. The questions sought to be

reviewed in the instant petition are directly and inextricably related to the conviction of the individuals. Consequently, the granting of the instant petition for rehearing, or clarification of this Court's reason for denying the petition will safeguard and secure the rights of petitioner and the respondents in Docket 1291 to have the grounds of assigned error considered either by this Court or by the Court of Appeals. As matters now stand, not only have petitioner and the individual respondents not had such review, but their right to such review is in serious jeopardy.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, or, alternatively, the basis for this Court's denial of the petition for a writ of certiorari be clarified.

Respectfully submitted,

MILTON A. BASS,
SOLOMON H. FRIEND,
Attorneys for Petitioner.

Certificate of Counsel

I, SOLOMON H. FRIEND, one of the counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision (2), of the Rules of this Court.

SOLOMON H. FRIEND,
Counsel for Petitioner.